

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

ROY SOUTHERS,

DEFENDANT

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CRIMINAL No. 00-83-P-H

**ORDER ON DEFENDANT’S MOTION TO DISMISS AND GOVERNMENT’S
MOTION TO CERTIFY QUESTION OF STATE LAW TO THE
SUPREME JUDICIAL COURT OF MAINE**

I have previously ruled that one portion of Maine’s misdemeanor assault statute—the language criminalizing “offensive physical contact to another,” 17-A M.R.S.A. § 207 (West 1983)—does not categorically presuppose physical force. United States v. Weeks, Criminal No. 00-4-B-H (D. Me. Sept. 28, 2000). I decline the Government’s invitation to revisit that conclusion.¹

The defendant, Roy Southers is charged with illegally possessing weapons when he was previously convicted of a “misdemeanor crime of domestic

¹ Contrary to the Government’s argument, State v. Pozzuoli, 693 A.2d 745, 747 Me. (1997), does not establish that offensive physical contact requires physical force under Maine law. The Law Court quoted approvingly a trial court jury instruction on offensive physical contact: “It’s something less than bodily injury . . . but requires more than a mere touching of another. And basically its [sic] a question of was the contact under the circumstances such that a reasonable person would find it to be offensive.” Id. (omission in Pozzuoli). This approved instruction nowhere suggests that “physical force” is a component of offensive physical contact. Indeed, the facts of Pozzuoli (unconsented to sexual touching while the victim feigned sleep), where the Law Court upheld the assault conviction, did *not* involve physical force.

violence.” The latter is defined as an offense that “has, as an element, the use or attempted use of physical force.” 18 U.S.C.A. § 921(a)(33)(A)(ii) (2000). Southers’s previous conviction is a May 27, 1992, assault conviction in Maine District Court, where Southers pleaded *nolo contendere* to the charge that he did “intentionally, knowingly or recklessly cause bodily injury or offensive physical contact to Tammy Gardner.” I reject the Government’s argument that by pleading *nolo contendere* and being adjudicated guilty, Southers admitted both elements of the disjunctive charge (bodily injury or offensive physical contact). He could have been found guilty after a trial if the evidence supported *either*. Likewise, a plea of guilty was appropriate if *either* one was uncontested. (I **DENY** the Government’s motion to certify that question to the Maine Supreme Judicial Court sitting as the Law Court, because the answer is so obvious.) Thus, this language alone does not show that the 1992 assault conviction was for causing bodily injury rather than offensive physical contact.

Remaining language in the Criminal Complaint to which Southers pleaded specifies “to wit; pushing her, throwing her on the floor and ripping her clothes.” This language describes offensive physical contact, but it does not demonstrate that bodily injury occurred and therefore that causing bodily injury was the type of assault to which Southers pleaded. As I said in Weeks, it is tempting to use this additional language to conclude that physical force was in fact used and that the conviction therefore qualifies. But as I ruled in Weeks, although physical force may in fact have occurred, it is not an *element* of the offensive physical contact

portion of the assault statute. The First Circuit instructs that I can look to the conduct to determine whether the prosecutor and the defendant both believed that the plea was to the generically violent crime (here, the bodily injury part of the assault statute), but *not* to examine “the violent or non-violent nature of [the] particular conduct.” United States v. Harris, 964 F.2d 1234, 1236 (1st Cir. 1992).² As a result, it cannot be said here that Southers’s plea was to the generically violent assault crime, specifically causing bodily injury.

My ruling in Weeks affected application of the Sentencing Guidelines. The issue here is the sufficiency of the Indictment. But I see no reason to reach a different conclusion. The First Circuit made clear in United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999), that the violence must be part of the underlying state conviction as defined in the state statute, not proven later at the federal trial for illegal weapons possession (“the mode of aggression . . . must appear within the formal definition of an antecedent misdemeanor to constitute it as a predicate offense”). United States v. Shepard, 231 F.3d 56 (1st Cir. 2000), has not changed the analysis. Where the state statute has both a violent and a nonviolent component as here, the focus remains on determining whether a defendant has pleaded guilty to the “generically violent” crime, id. at 65-67, not the specifics of

² Harris is much like this case. The Massachusetts assault statute at issue there had two components—“one involving actual (or potential) physical harm and the other involving a ‘nonconsensual’ but unarmful touching.” 964 F.2d at 1236. Its guidance, therefore, is particularly apt.

his underlying conduct.³ Since the state conviction cannot be determined to be of a generically violent crime, the federal Indictment is insufficient.

The defendant's motion to dismiss the Indictment is **GRANTED**. As a result, no action is necessary on the Government's motion for preliminary determination of admissibility. (The parties agree on the contents of the underlying Criminal Complaint.)

So ORDERED.

DATED THIS 3RD DAY OF JANUARY, 2001.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

³ United States v. Damon, 127 F.3d 139 (1st Cir. 1997), also supports this approach. See id. at 145-46. I observe that the statutory inquiry is significantly narrower than the Guideline sentencing inquiry as to what is a "crime of violence." The Guidelines include within the definition criminal conduct that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2) (2000). That definition would encompass Souther's charged conduct. But the statutory definition applicable here, 18 U.S.C.A. § 921(a)(33)(A), has no comparable language.

U.S. District Court
District of Maine (Portland)
Criminal Docket For Case #: 00-Cr-83

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